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Supreme Court, U.S.
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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. [redacted]

[redacted]

vs.

[redacted]

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF [redacted]

AND BRIEF IN SUPPORT THEREOF

[redacted]

[redacted]

[redacted]

[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .

Morris Eisenberg, Petitioner and Appellant below,

v.

Commissioner of Internal Revenue, Respondent and Appellee below,

---

No. .

Herman Schaeffer, Petitioner and Appellant below,

v.

Commissioner of Internal Revenue, Respondent and Appellee below.

Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit and Brief in Support Thereof.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

Summary Statement of the Matter Involved.

This case involves taxability of certain income to petitioners either under the family partnership doctrine, or as grantors of trusts to which petitioners conveyed partnership interests.

The material facts may be summarized as follows:

About **ten years before the creation of this family partnership,** and about **five years before the petitioners organized** Bailey's Furniture Store, **the business out of which the family partnership grew,** each of the petitioners had opened savings bank accounts for his children. Each account was designated with the name of one of the petitioners as trustee for one of his children (R. 6). All of the children were then minors. (The oldest became of age in 1942.) The petitioners' names were added to the accounts at the instance of the bank officials (R. 18).

When Bailey's was first organized about one-half of the capital was obtained from the children's bank accounts. Each of the petitioners borrowed about $25,000.00 from his children's accounts in order to obtain capital to start the business. The business was first organized as a partnership consisting of the two petitioners, and there was no record made on the firm's books at that time of the children's interest in these funds (R. 6, 7, 17, 19, 60).

Bailey's Furniture Store was engaged in the retail furniture business, with practically all of its sales made on an installment basis (R. 10). The retail furniture installment business requires a substantial volume of continuously available capital (R. 17, 18). After a few years had elapsed, when petitioners wished to repay the children, they found themselves unable to do so without seriously handicapping their business (R. 35, 64). They then gave consideration to setting the children up as creditors on the books of Bailey's Furniture Store. This idea was rejected because of the effect such a move would have had on the firm's credit rating (R. 20). It was then determined that the children's interests in the business should

be given recognition by making them partners. Pursuant to that decision the following steps were undertaken:

On December 30, 1939, petitioners executed their first written partnership agreement. The agreement was to run for one year, with automatic renewal from year to year in the absence of notice. Each of the petitioners was to receive a salary of $7800.00 for the year (R. 6, 7). On January 2, 1940, each of the petitioners executed several trust indentures, one for the benefit of each of his children, giving to himself, as trustee, various percentage interests in Bailey's aggregating one-half of his interest therein. On January 3, 1940, the petitioners, as individuals and as trustees, executed an Addenda to the partnership agreement making the trusts partners in Bailey's. The firm's bank was notified, and a fictitious names certificate showing the children's interests was filed with the Commonwealth of Pennsylvania (R. 7, 8, 9).

A capital account for each child's trust was set up on the books of Bailey's at the beginning of 1940, and the petitioners' accounts were charged accordingly. Beginning in 1940 and through the taxable years here involved, each child's account has been credited with its proportionate share of the annual income remaining after deduction of petitioners' salaries. The petitioners each received an annual salary of $7500.00 to $10,000.00. No portion of the partnership income credited to the children has been used to defray household expenses or expenses of the children (R. 10).

In 1942, as a result of adversary proceedings brought in the Philadelphia Common Pleas Court by one of the trust beneficiaries, and in which all of the trust beneficiaries and both of the petitioners were named as parties, the 1940 trust agreements were reformed and petitioners were removed as trustees. The decree became final on May 19, 1943. By its terms the new trust agreements were made effective as of January 2, 1940. In each new agreement the wife of petitioner and another person were

named as the new trustees (R. 10, 11). In addition, the revised agreements made the following important changes:

The trustees were given the power to withdraw the trust funds from the business. The trustees were granted the right to inspect the partnership's books and records and to have periodic financial reports. The trustees could require such detail in the reports and such additional information as they considered desirable, and on trustees' demand they were to receive the trusts' share of partnership profits from time to time (R. 12, 48, 49).

The trustees were forbidden to pay any part of principal or income to the grantors or to use any of it for grantors' benefit. The trustees were prohibited from distributing principal during the term of the trust or use any of the trust income during the beneficiaries' minority (R. 11, 12)

Despite the above facts, most of which appear in their Findings, the Tax Court made the following ultimate finding:

> "No completed gifts of independent property were ever made either to the children of Schaeffer or Eisenberg, respectively, nor to the trusts created in their behalf and none of them were valid partners in the Bailey's Furniture Co. for federal income tax purposes" (R. 12).

In prior proceedings, involving the tax years 1940 and 1941, it was determined (Eisenberg and Schaeffer *et al v.* Commissioner, 5 T. C. 856, affirmed 161 F (2d) 506 (CCA 3rd), Cert. Den'd. 332 U. S. 767), that petitioners were taxable on the income of the trusts under the doctrine of Helvering *v.* Clifford, 309 U. S. 331. In those proceedings no determination was made on the family partnership issue. The revised trust agreements were not considered to be effective with respect to those years, nor were the so-called Clifford regulations (Reg. III, Sec. 29.22(a)-21) considered in that litigation.

With respect to the tax years now under consideration (1942-1944), the Commissioner has argued two grounds for taxing the entire business income to the petitioners, *i. e.*—that the children's partnership interests are not entitled to tax recognition, and—that under the Clifford doctrine the income of the trusts is taxable to petitioners as grantors thereof. The Tax Court accepted the Commissioner's view on the family partnership question, and found it unnecessary to go into the question of petitioners' taxability as grantors (R. 13). Its opinion recites that the interests of the children are not recognizable in the absence of capital originating with them or services contributed by them (R. 14).

The Circuit Court entered judgment affirming the decision of the Tax Court on May 9, 1949 (R. 73, 74), upon the Findings and for the reasons stated in the Tax Court opinion, without any further discussion (R. 72). On May 26, 1949, on motion of petitioners, the time for filing application for rehearing was extended by the Circuit Court (R. 77). Within the time so extended petitioners filed their Petition for Rehearing (R. 78). On August 16, 1949, the Circuit Court denied the petition for Rehearing and its judgment thereupon became final (R. 82).

Jurisdiction

The jurisdiction of this court is invoked under 28 U. S. C. 1254.

Questions Presented

1. Did not the petitioners intend to create a bona fide partnership?

2. Are not the partnership interests of the trusts established by petitioners for their children recognizable for tax purposes?

3. Are the petitioners taxable on the income of the trusts as grantors thereof?

Reasons Relied on for Allowance of Writ.

1. The decision of the Circuit Court affirming, and in effect adopting as its own, the opinion of the Tax Court is in conflict with the decisions of this court on family partnership cases (Lusthaus *v.* Commissioner, 327 U. S. 293; Commissioner *v.* Tower, 327 U. S. 280; Commissioner *v.* Culbertson, U. S. , 93 L. Ed. 1331). The Tax Court in this case, as in the Culbertson case, applied the tests of "original capital" and "vital services" as the exclusive criteria. In its opinion, the Tax Court made no mention of, and gave no consideration to, the question of whether or not the parties had a bona fide intent to create a partnership.

2. The decision of the Circuit Court, and denial of petitioners' request for a rehearing, are in conflict with the decisions of other circuit courts. Hartz *v.* Commissioner, 170 F (2) 313 (C. A. 8); Walsh *v.* Commissioner, 170 F (2) 535 (C. A. 8); Kent *v.* Commissioner, 170 F (2) 131 (C. A. 6); Lawton *v.* Commissioner, 164 F (2) 380 (C. A. 6); LeSage *v.* Commissioner, 173 F (2) 826 (C. A. 5); Culbertson *v.* Commissioner, 168 F (2) 979 (C. A. 5). Since the Culbertson decision by this Court, circuit courts, in dealing with similar family partnership cases decided by the Tax Court before the Culbertson decision, have remanded such cases to the Tax Court for further proceedings in conformity with the Culbertson decision: (Seabrook *v.* Commissioner, 176 F (2) 605 (C. A. 5); Harris *v.* Commissioner, 175 F (2) 444 (C. A. 9); Trepte *v.* Commissioner, 175 F (2) 444 (C. A. 9)); or have themselves applied the principles clarified in the Culbertson decision. Wenig *v.* Commissioner F (2) (CADC, July 18, 1949), §72,540 P-H Fed. 1949. See also Ginsburg *v.* Arnold, reversed and remanded on rehearing, F (2) , C. A. 5, September 13, 1949); § 72,591 P-H Fed. 1949.

WHEREFORE, your petitioners, by their attorney, Harry Shapiro, Esquire, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit affirming the judgment of the Tax Court.

Harry Shapiro

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

Opinions Below.

The memorandum opinion of the Tax Court (R. 13, 14) may be found at § 48,181—1948 P-H T. C. Memo. The opinion of the Court of Appeals (R. 72), Eisenberg *v.* Commissioner, is reported in 174 F (2) 827 (C. A. 3).

Jurisdiction.

The jurisdiction of this court is invoked under 28 U. S. C. 1254.

Statement of the Case.

The statement of the case appears in the Petition at pages 2 to 5 inclusive, and is omitted here in the interest of brevity.

Specifications of Errors.

The Court of Appeals erred:

1. In affirming the decision of the Tax Court.

2. In refusing to grant a rehearing after entry of the decision by this Court in Commissioner *v.* Culbertson.

3. In holding that the children's partnership interests were not recognizable for federal tax purposes.

4. In failing to determine that petitioners are not taxable on the income of the children's trusts as grantors thereof, under the doctrine of Helvering *v.* Clifford.

5. In upholding the Tax Court's finding that there were no completed gifts to the children.

Argument.

It is evident from Culbertson that the Tax Court had consistently applied an erroneous concept of the Lusthaus and Tower cases in their consideration of family partnership cases. The Culbertson opinion has without question

revised that concept. It is now urged that as a general proposition tax cases decided against a taxpayer under the old erroneous concepts should be remanded for consideration under the corrected concepts.

In reversing and remanding the Culbertson case to the Tax Court, this Court stressed the misplaced emphasis,—the erroneous standards—applied by the Tax Court. In the instant case the same false emphasis underlies the decision of the Tax Court. (The Circuit Court affirmed without discussion "Upon the findings of the Tax Court, which we cannot say are clearly erroneous, and for the reasons stated in the opinion filed by Judge Opper for that Court * * *" (R. 72).)

Here, as in Culbertson, the Tax Court reasoned that "Absent both capital originating with them and the contribution of services, * * * the alleged partnership with the children is not recognizable for Federal tax purposes" (R. 14). At the time of this decision the Tax Court was still laboring under the twin misapprehensions, exposed as such by Culbertson:—that the Lusthaus and Tower cases devised a special concept of partnership for Federal tax purposes,—and that no partnership was valid for such purposes in the absence of "original capital" or "vital services". Again, as in Culbertson, the Tax Court did not discuss the bona fides of the parties nor "once in its opinion is there even an oblique reference to any lack of intent * * *."

Had the inquiry been made as to the intent of the parties there would be but one conclusion,—that the formation of this partnership was brought about by compelling business considerations. Hartz *v.* Commissioner, *supra;* LeSage *v.* Commissioner, *supra;* O. H. Delchamps, 13 T. C. #39, Decided August 30, 1949. The circumstances of the business were such that partnership was the only means available to petitioners for satisfying their obligations to their children, *i. e.,* the obligation which arose upon the use of the children's money to start the partnership business. The business was without sufficient

cash to discharge this obligation. Any attempt to recognize this obligation by setting the children up as creditors, would have seriously impaired its credit rating and seriously endangered its financial stability. The Tax Court's conclusion that this was the fathers' money is "not within the realm of legitimate inference from the record as a whole or from the specific facts found." Wenig *v.* Commissioner, *supra,* p. 72,885 P-H Fed. 1949. That conclusion stems from the erroneous concept of "original capital" which was fashionable with the Tax Court prior to the Culbertson decision. The Tax Court no longer follows such a concept. Edw. A. Theurkauf, 13 T. C. #70, Decided October 7, 1949; O. H. Delchamps, *supra.*

If the Tax Court's inquiry in this case had been directed to the source of the business earnings, petitioners must nevertheless prevail. The evidence is undisputed that capital was the major income producing factor in the petitioners' business (R. 21-42) and that petitioners were adequately compensated for their services before distribution of profits (R. 42).

Prior to the Culbertson decision other circuits were already in conflict with the action of the Third Circuit herein. Eighth: Hartz *v.* Commissioner, *supra;* Walsh *v.* Commissioner, *supra.* Sixth: Kent *v.* Commissioner, *supra;* Lawton *v.* Commissioner, *supra.* Fifth: LeSage *v.* Commissioner, *supra;* Culbertson *v.* Commissioner, *supra.*

In the instant case the Circuit Court refused a petition for rehearing sought on the basis of the conflict of the Tax Court's opinion herein with this Court's opinion in the Culbertson case.

Since the Culbertson decision, both the Fifth and the Ninth Circuits have reversed decisions against taxpayers in similar cases, and remanded the cases to the lower courts for further proceedings in conformity with the views expressed in the Culbertson decision. Ninth: Harris *v.* Commissioner, *supra,* and Trepte *v.* Commissioner,

supra. Fifth: Seabrook *v.* Commissioner, *supra,* and Ginsburg *v.* Arnold, *supra.*

The effect on the Tax Court of this Court's decision in the Culbertson case is evident from its recent decisions. By analogy it would seem that petitioners would have obtained a favorable result if the Tax Court had had the Culbertson decision to guide it. Edw. A. Theurkauf, *supra;* O. H. Delchamps, *supra;* Fred C. Campbell, §49,198 P-H T. C. Memo, Decided August 25, 1949; Est. of Frederick A. Depue, 13 T. C. #62, Decided September 30, 1949. A number of the circuits are apparently willing to give the Tax Court and other lower courts an opportunity to conform to Culbertson in cases in which decisions were entered by the lower court before it had the benefit of the Supreme Court's latest word on the subject. The position of taxpayers with similar cases pending before other circuits merits the further attention of this Court. For those taxpayers whose cases have already reached final judgment against them, there can be no assistance from the courts. This is purely a legislative problem. But for those against whom no final judgment has been entered, whose cases were considered by lower courts searching only for "original capital" and "vital services", judicial relief can and should be made available.

Conclusion.

It is, therefore, respectfully submitted that for the foregoing reasons your Honorable Court should grant the Petition for Writs of Certiorari.

Respectfully submitted,

Harry Shapiro

Attorney for Petitioners.

Hirsh W. Stalberg,
David V. Shapiro,

Shapiro, Conner, Rosenfeld & Stalberg,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 450

MORRIS EISENBERG, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 451

HERMAN SCHAEFFER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 5-14) is not officially reported. The opinion of the Court of Appeals (R. 72) is reported at 174 F. 2d 827.

JURISDICTION

The judgments of the Court of Appeals were entered on May 9, 1949. (R. 73, 74.) The petition for rehearing was denied on August 16, 1949. (R. 82, 83.) The petition for certiorari was filed on November 9, 1949. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the Tax Court's finding that the taxpayers' respective children were not to be recognized as partners for federal income tax purposes.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) [As amended by Section 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. 1946 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b).

(26 U.S.C. 1946 ed., Sec. 182.)

STATEMENT

The petitioners, Schaeffer and Eisenberg, have been associated in various retail enterprises since about 1920. (R. 6.) In 1930 Schaeffer opened four separate bank accounts, supposedly for each of his four children, but in his own name as trustee, there being no written trust instruments. In 1930 and 1931 Eisenberg opened precisely similar accounts for his three children. In October, 1936, the petitioners, as partners, started a retail business known as "Bailey's Furniture Company". During the next two years each petitioner withdrew about $25,000 from the bank accounts supposedly held in trust for his children,

which sums were used in the furniture business. (R. 6.)

On December 30, 1939, the taxpayers for the first time reduced to writing their partnership agreement, providing that the two would contribute all the assets to be used by Bailey's Furniture Co. and that the capital investment of each would be considered as $60,000. (R. 6-7.)

On January 2, 1940, Eisenberg created three and Schaeffer four separate irrevocable trusts for the benefit of their respective minor children; each executed several trust indentures, one for the benefit of each child, giving to himself as trustee various percentages of his interest in the business, totalling in each case one-half of his interest. (R. 7-8.) On the following day the petitioners, individually and as trustees, executed "addenda" to their articles of partnership which purported to make the trusts partners in the enterprise. (R. 9.) Thereafter, in proceedings involving the tax years 1940 and 1941, it was determined under the rule of *Helvering* v. *Clifford,* 309 U.S. 331, that the income of the trusts was taxable to the petitioners; no determination was made as to whether a genuine family partnership existed. *Eisenberg* v. *Commissioner,* 161 F. 2d 506 (C.A. 3), certiorari denied, 332 U.S. 767. The trust instruments were thereupon reformed in sundry respects and the wife of the taxpayer and another person—as to whose identity the

record is silent—substituted for the taxpayer as trustee in each case.[1] (R. 10-12.)

It is not contended that either the beneficiaries of the trusts or the substituted trustees ever contributed any services or participated in any way in the conduct of the business. (R. 13.) The business and its assets continued under the complete control of the taxpayers, and so far as appears from the record, its operation continued in all respects exactly as in the past.

The Commissioner, finding that the children were not partners in the furniture business for tax purposes, and that the entire earnings of that business consequently represented income to the petitioners, determined deficiencies in the petitioners' income tax for 1943 and 1944. The Tax Court held that no completed gifts of independent property had ever been made to the children or to the trusts created in their behalf and that none of them were valid partners in Bailey's Furniture Co. for federal income tax purposes.[2] (R.

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[1] The terms of the reformed trust agreements are set out at R. 43-54.

[2] The taxpayers sought also to raise the issue whether, under the *Clifford* doctrine, income from the trusts, as reformed, was taxable to the grantors. The Tax Court's conclusion that all of the partnership income was attributable to the petitioners made it unnecessary to consider the *Clifford* issue, since as the Tax Court said, "The subsequent reformation of the 'trusts,' after the fathers had exercised their control by committing the funds to the business, whatever its legal efficacy, cannot alter this result as to the partnership, * * * regardless of what its effect might have been on the taxability of the trust income on purely *Clifford* grounds." (R. 14.)

12.) The Court of Appeals affirmed (R. 72) and denied petitions for rehearing (R. 82, 83.)

ARGUMENT

The reasons proposed for the granting of certiorari here are substantially the same as those asserted in *Kohl* v. *Commissioner,* 170 F. 2d 531 (C.A. 8th), certiorari denied, 337 U.S. 956, rehearing denied, October 10, 1949; *Fainblatt* v. *Commissioner,* 172 F. 2d 389 (C.A. 2d), certiorari denied, 337 U.S. 957, rehearing denied, October 10, 1949; *Moore* v. *Commissioner,* 170 F. 2d 191 (C.A. 4), certiorari denied, 337 U.S. 956, motion for leave to file petition for rehearing denied October 10, 1949. While the Tax Court here, as in the *Moore* case, appears to have relied on the absence of "capital originating" and "vital services" in determining that no valid partnership existed, no other conclusion could conceivably be reached under the principles enunciated in *Commissioner* v. *Culbertson,* 337 U.S. 733, were the case remanded to the Tax Court; it was presumably for this reason that the Court of Appeals denied the petition for rehearing filed subsequent to this Court's decision in the *Culbertson* case, and the simultaneous denials of certiorari in the *Moore, Fainblatt,* and *Kohl* cases.

Under the test laid down in the *Culbertson* case —i.e., whether "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise" (337 U.S. at 742)—it is apparent not only that

the Tax Court's conclusion that the children were not partners is not "clearly erroneous" but that no other conclusion could have been reached on the present record. The record reveals a persistent effort by the petitioners, commencing when the business began to show substantial profits,[3] to effectuate a tax saving by attributing some part of the income from it to some one other than themselves, without abandoning their substantial control and ownership of the business and its assets. The purported "partners" never contributed any services to the business, were never consulted as to its affairs, and did not in any respect participate in its management. The petitioners' substantial control of the business and its assets was uninterrupted.

Taxpayers contend, however, that their children made bona fide contributions to the business in that taxpayers withdrew and utilized in the business between 1936 and 1939 funds which they had deposited in savings bank accounts for their children in their own names as trustees in 1930 and 1931. It is undisputed that the use of the funds was not considered by taxpayers or the children to have been a contribution to capital at the time of the withdrawals; for it was not until 1940 that taxpayers purported to establish a partnership with the trusts for their children.

[3] In 1937 there was a loss; in 1938, a profit of $3,545.28; in 1939, a profit of $33,437.47; and in 1940, profits rose to $70,659.61 (R. 62-64). The partnership with the children was not established or even considered until the end of 1939.

(R. 61.) Moreover, the Tax Court found as a fact that no completed gifts were made to the children by virtue of the opening of the savings accounts.[4] (R. 12.) Certainly the form of the account without more does not compel or even permit the conclusion that there was in legal effect a declaration of trust or a completed gift. So far as the record discloses there was no express declaration of trust. No formal written instruments of trust were drawn in connection with the deposits; there was nothing to indicate that the beneficiaries had been notified; nor was there any delivery of the pass books. See 1 Bogert, *Trusts and Trustees,* par. 47, pp. 204-222. Most important is the fact that taxpayers at all times retained dominion and control over the funds, withdrew and utilized them for their own purposes in their own business and subjected them to commercial hazards in a manner inconsistent with a trust relationship. (R. 6.) Under such circumstances the Tax Court was justified in determining that taxpayers did not

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[4] This determination, it may be noted, is entirely in harmony with the law of Pennsylvania under which it is established that a trial court is justified in holding that no completed gifts have been made and no trusts established where depositors continue to exercise the absolute control and dominion of owners subsequent to the deposits.

In *Rambo* v. *Pile*, 220 Pa. 235, 241, the court stated:

> There is nothing in it to show an intention, on the part of the depositor, to hold the fund in trust, except the form of the deposit. All the circumstances surrounding the deposit tend to establish the fact that the deposit was made with the intention, on the part of the depositor, of retaining the control and ownership of the fund in himself and that he did exercise absolute control over the fund from its inception until the date of his death.

intend to relinquish control and ownership of the funds and that, there being no donative intent, as a matter of law no completed gifts had been made. In short, the working capital purportedly contributed by the children consisted of funds which the taxpayers had freely utilized in their business for the preceding four years and which, according to the Tax Court's finding, had never been given away. Moreover, apart from the theoretical powers of the trustees, the record shows that as a matter of fact none of the business profits were distributed to the children or to the trusts as partners subsequent to the formation of the partnership. (R. 61.) See *Commissioner* v. *Culbertson,* 337 U.S. 733, 747; *Hash* v. *Commissioner,* 152 F. 2d 722 (C.A. 4th), certiorari denied, 328 U.S. 838, rehearing denied, 328 U.S. 879; *Belcher* v. *Commissioner,* 162 F. 2d 974 (C.A. 5), certiorari denied, 332 U.S. 824.

If the taxpayers' children contributed nothing to the partnership, it is apparent that they were not partners. As this Court stated in the *Culbertson* case (pp. 739-740):

> To hold that "Individuals carrying on business in partnership" includes persons who contribute nothing during the tax period would violate the first principle of income taxation: that income must be taxed to him who earns it. *Lucas* v. *Earl,* 281 U.S. 111 (1930); *Helvering* v. *Clifford,* 309 U.S. 331

(1940); *National Carbide Corp.* v. *Commissioner,* 336 U.S. 422 (1949).

CONCLUSION

The determination of the Court of Appeals rests on the particular facts of the case, is correct, and presents no conflict. The petition should be denied.

Respectfully submitted,

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DECEMBER, 1949.

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